Supreme Court, U.S.
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No. 94-221

In The

Supreme Court of the United States

October Term, 1994

ROBERT C. DOWNER,

Petitioner,

vs.

ELDON HANNEMAN AND PATRICIA HANNEMAN, HUSBAND AND WIFE

AND

MAXINE V. SWENSON,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

BRIEF IN OPPOSITION OF RESPONDENTS ELDON HANNEMAN AND PATRICIA HANNEMAN, HUSBAND AND WIFE

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to consider an evidentiary standard utilized in the State Courts of Nevada in a tort case between Nevada citizens filed and tried in a Nevada State Court under State law.

2. Should this Court grant certiorari to review an evidentiary standard created by the Department of the Interior for resurveys of government lands when the Department of the Interior is not a party to the action below and its evidentiary standards were not utilized by the Nevada Courts in the instant case.

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Eldon and Patricia Hanneman (Hanneman) Respondents, respectfully submit this brief in opposition to the Petition for Writ of Certiorari to the Supreme Court of The State of Nevada, dated June 10, 1994 filed herein by Petitioner Robert C. Downer, which Petition was received by Respondents on August 30, 1994.

I

STATEMENT OF THE CASE

A. NATURE OF THE CASE

The matters of which Petitioner complains are two separate and distinct matters and Petitioner fails to distinguish between them. We will discuss Petitioner's involvement in the two proceedings hereinafter.

Petitioner correctly states that in 1965 he was a licensed land surveyor (in Nevada) and was employed to subdivide a portion of land located in a rural area adjacent to Highway 395 in Douglas County, Nevada. Stoddard Jacobsen was the owner of a portion of land in the Northern part of Section 9, Township 11 North, Range 21 East, M.D.B.&M. (A25). Contiguous to the North of Section 9 is Section 4 of the same township and range. The Western portion of Section 4 is trust land held by the Bureau of Indian Affairs and the Eastern portion is owned by the BLM (A29). Downer knew when he began the survey of the adjacent ownerships.

The northern most lot as platted by Downer was shown on his plat as being 5.88 acres of land. Respondents Hanneman acquired ownership of that parcel which was improved with a well and a run down house and garage in 1976 for a purchase price of $35,000.00. (A28).

In 1981 the Hannemans were informed by the attorney for a mining company holding claims on the BLM property in Section 4 that the boundary between Sections 4 and 9 was approximately 200 feet south of the Downer boundary and that the Hanneman property in fact was

1.54 acres which did not include the well, the house or the garage. (A28-29).

Upon receiving that information Hanneman informed Respondent Maxine Swenson who was his seller and she in turn informed Downer. Downer contacted BLM which then conducted a dependent resurvey on the boundary line common to Sections 4 and 9. The results were inconsistent with Downer's survey. The Nevada State Director of BLM dismissed Downer and Jacobsen's protest without a hearing. Downer and Jacobsen appealed the dismissal and Administrative Law Judge Mullen of the Interior Board of Land Appeals set aside the dismissal and ordered a hearing before Administrative Law Judge L.K. Luomo. (A30).

A variety of proceedings before the Interior Board of Land Appeals occurred thereafter and are discussed hereafter.

In the interim, however, the Hannemans filed an action in the Ninth Judicial District Court of the State of Nevada in and for the County of Douglas against Downer, among others. Allegations against Downer included allegations of negligence. (A26). That case was tried in 1991 and resulted in a judgment in favor of Hannemans. That judgment was appealed and was affirmed in part and reversed in part by the Nevada Supreme Court in March of this year. The negligence of Downer was affirmed, and the matter was remanded for an additional assessment of damages. (A23, 24).

This Petition is addressed to the State Court proceedings.

B. PROCEEDINGS BEFORE THE INTERIOR BOARD OF LAND APPEALS

Downer was unsuccessful in his efforts before the Interior Board of Land Appeals and as a result petitioned the U.S. District Court for the District of Nevada for review of the administrative proceedings. The District Court dismissed his application for want of standing. Downer then appealed to the Ninth Circuit which affirmed the District Court. *Downer v. Hodel*, 977 F.2d 588 (1992).

The Ninth Circuit summarized the IBLA proceedings as follows:

> "In 1965, Robert Downer surveyed land owned by STODDARD JACOBSEN, adjoined on the north by land held in trust by the United States for Indians. Downer obtained copies of the original 1881 plat and field notes from the BLM Records Office in Reno, Nevada. In his reconnaissance survey to locate section corners along the north line of section 9, he was unable to locate any authentic corners. Rock piles that were reported by BLM to be the northwest corner and the north quarter corner of the section were determined by Downer to be spurious. See STODDARD JACOBSEN & Robert C. Downer v. Bureau of Land Management, 85 IBLA 335, 339-40 (1985). Each was over 200 feet south of the one-mile distance north of the south section line recorded in the plat and in the notes.
>
> The Government leased the trust land to a mining company, which hired AER, Inc., a private surveying company, to survey the trust land in 1981. The AER survey adopted the rock piles as

markers and placed the boundary between Sections 4 and 9 of Township 11 North, Range 21 East, Mount Diablo Meridian, Nevada, about 200 feet south of Downer's survey line. Jacobsen had sold some of the property in the 3/4-mile long, 200-foot wide strip of approximately 20 acres to third parties. Because of the discrepancy, BLM resurveyed the property in 1982. BLM's resurvey substantially adopted the AER result. Jacobsen and Downer appealed, and the IBLA, finding a substantial question of fact, referred the case to an administrative law judge for hearing. 85 IBLA 335 (1985). That judge remanded the case to the BLM for a resurvey, requiring the BLM to establish beyond a reasonable doubt the accuracy of its placement of the corner shared by sections 4, 5, 8 and 9. 97 IBLA 182 (1987). The BLM moved for reconsideration of the evidentiary standard. The IBLA granted the motion and held that the BLM need only provide substantial evidence to support its resurvey. 103 IBLA 83 (1988). Because substantial evidence supported the 1982 dependent resurvey's placement of the common corner, the IBLA upheld that survey and did not order another survey. Id. A successor in interest to a landowner who had purchased land from Jacobsen sued Jacobsen and Downer in Nevada state court in 1984. Jacobsen cross-claimed against Downer alleging that Downer had surveyed Section 9 improperly. Judgment was entered against Downer in March 1992."

The Secretary of the Interior is charged by Congress with the performance of "all executive duties appertaining to the surveying and sale of public lands", (43 U.S.C., Sec. 2 and see 43 U.S.C., Sec. 52), including the issuance

of patents for public lands. 43 U.S.C., Section 15. The power to make and correct surveys of the public lands belongs exclusively to the Political Department of the Government. *Cragin v. Powell*, 128 U.S. 691 (1888).

The Government's interest was in Section 4 which contained public lands. Since, however, the Government through its prescribed procedures established a boundary line that was approximately 200 ft. south of the Downer survey the Hannemans were necessarily dispossessed of their home.

C. PROCEEDINGS BEFORE THE COURTS OF NEVADA

On March 27, 1992 the Ninth Judicial District Court of the State of Nevada, in and for the County of Douglas, entered a Judgment in favor of Hanneman and against, among others, Downer. (A25-50). On March 30, 1994 the Nevada Supreme Court affirmed liability against Downer and remanded the case to increase an award of damages to Hannemans. That case is reported at 110 Nev. 167, 871 P.2d 279 (Nev. 1994). Petitioner's Appendix for the Nevada Decision (A3) omits the following:

> "Prior to commencing the survey Downer obtained plats, notes and prior surveys from the Bureau of Land Management (BLM). When surveying the property Downer found and rejected the monuments, accessories and corners because they did not comport to the field notes of the original survey and because he believed them to be fraudulent. Thus, Downer relied almost exclusively on the calls and distances in the field

notes and upon plats in determining the northern boundary of Jacobsen's property."

The Trial Court noted "Downer defended his survey by first commenting that the method described by Forsythe would have been financially unworkable in the context of such a small subdivision."

The Trial Court also found:

"3. Downer acted unreasonably, and he negligently performed the survey he recorded in 1966.

a. Downer's behavior on the stand was deliberately evasive and non-responsive to the questions asked of him, and, as a result, he was not a credible witness. It is abundantly clear from the evidence presented that Downer failed to act reasonably when performing his survey in 1965, and that his actions since that time have been singularly designed to shore up his position after the fact. Plaintiff's Exhibit D is the most graphic illustration of Downer's failure to meet the standard of care. *Every one* of his own surveys since 1965 differs from the previous one, and *every one* of his surveys establishes boundaries in Section 9 which are different from the BLM survey." (A48).

The Trial Court also noted:

"On cross, Downer admitted that he also never located, in 1965, the northeast corner of Section 9, but that he established the northern boundary of Section 9 anyway. He also admitted that he never found a monument along the chop line which he believes marks the section line. Downer reiterated that the only monument he

physically located in 1965 was the southeast corner of Section 9." (A44).

The critical corner of the survey in question was the northwest corner of Section 9 which is also the southwest corner of Section 4. At that corner BLM found a trachyte stone measuring 22x17x9 with markings. In addition, four uprooted blazed bearing trees were found, two of which were age dated to 1881, the year of the original survey. Downer rejected the monument and accessories and testified the markings on the stone looked fresh to him and suggested the trees had been moved to the area. (A280). Neither IBLA nor the Nevada Courts found Downer's explanation to be reasonable.

The law in Nevada is well settled that in determining boundaries monuments control irrespective of field notes and irrespective of testimony of witnesses. *Backer v. Gowen*, 73 Nev. 34, 307 P.2d 765 (1957). The Nevada Supreme Court relied upon this case below.

The law is also well settled in Nevada:

> "In a negligence action, the plaintiff has the burden of demonstrating the following: (1) that the defendant had a duty to exercise due care with respect to the plaintiff; (2) that the defendant breached this duty; (3) that the breach was both the actual and proximate cause of the plaintiff's injury; and (4) that the plaintiff was damaged." *Joynt v. California Hotel & Casino*, 108 Nev. 539, 835 P.2d 799 (1992).

Nevada also recognizes:

> "The mere fact that there was an accident or other event and someone was injured is not of itself sufficient to predicate liability. Negligence

is never presumed but must be established by substantial evidence." *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 370 P.2d 682 (1962).

This case was tried in Nevada in accordance with Nevada law and the Trial Court found substantial evidence of negligence. The Supreme Court in reviewing the evidence presented at trial agreed substantial evidence was presented.

II

CONCLUSION

The Petition in this matter asks for a Writ of Certiorari to the Supreme Court of the State of Nevada. The case was filed in the Nevada State Court alleging negligence under State law, was tried in State Court under State evidentiary standards. Petitioner was found negligent and that negligence was affirmed on appeal. Simply because an event occurred which caused damages to the Hannemans was not of itself sufficient to predicate liability. It was necessary for the Hannemans to satisfy the Nevada Courts that Defendant had the duty to exercise due care and that he breached its duty. When he postulated the scribed monument had recent markings and concluded that in 1881 the bearing trees had been dragged to their location he was reasonably found to be unreasonable and therefore negligent and therefore liable.

There are no issues in this case of due process of law and this case does not create or involve conflicts in Federal laws or standards. No Federal agencies are before

this Court. No Federal question was in issue or decided in the Nevada Courts. The Petition should be denied.

RESPECTFULLY SUBMITTED this 22nd day of September, 1994.

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